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A CONSIDERATION OF WHAT AMOUNTS TO DURESS  
PER MINAS AT LAW.

WE need only glance at the head of "duress" in Viner's or Bacon's Abridgment in order to ascertain how frequently cases involving this subject, in more ancient times, came up for adjudication.

The plea of duress was formerly one of every-day occurrence. As times were more refined, and the influence of law more disseminated, the necessity for the use of this defence became rarer; not so rare, however, as to make it profitless from a practical or historical stand-point, to investigate the present state of the law on the subject.

The old common-law definition is well known. It is stated in Cruise, "If a man through a reasonable or well founded fear of death or mayhem or loss of limb is forced to execute a deed, he may afterwards avoid it. But Lord Coke says it is otherwise where a deed is executed for fear of battery or burning his house, or taking away his goods, and the like, for these he may have satisfaction by recovery of damages:" 4 Cruise Dig. 406; 1 Blacks. Com.

Coke obtained his law from Bracton, who gives as instances of what amounts to duress produced through fear "*periculum mortis et corporis cruciatum*." He also lays down the proposition that this fear must be "*non suspicio vel cujuslibet vani vel meticulosi hominis sed talis qui cadere possit in virum constantum*:" Bract. l. 2, c. 5, p. 14.

A principle of natural law such as that which avoids obligations contracted through fear, never originates in the mere dictum of a text writer. We find upon further research that Bracton's rule is an almost literal transcript from the doctrine contained in Dig. 6, l. 6, *quod metus causa*, and C. 13, *de transactionibus*, which is to the effect that the duress must be such as to overcome the will of a courageous person, and that the violence must be of such a character as to put one in fear of losing his life or of suffering great punishment. The fear should be "*metus non vani hominis sed qui in homine constantissimo cadat*:" C. 6, ff. dict. tit. It should also be of some serious evil, "*metus majoris mali*."

The Roman law, which paid great regard to the *bona fides* of a transaction, did not allow any advantage to be gained by the wrongdoer. Resort to violence met with the severest condemnation. If restoration was not made by the party who had used force or duress, the party complaining had against him an action "*in quadruplum*:" Dig. 14, p. 3. The exception or plea of duress, was one well known; it was termed "*quod metus causa*." Gaius states it thus: "*Si eam rem a me petas, datur mihi exceptio perquam si metus causa te fecisse vel dolo malo arguero, repelleris*:" Gaius, § 117.

The principle stated in the above citations from the Roman law, is condensed in the maxim "*nihil tam consensui contrarium est quam vis et metus*:" Dig. l. 18, tit. 1, 9, § 2. The consent being a material component of every contract, when the mind was not free to act, there was no "*consensum ad idem*" since "*non quia voluit pactus est sed quia coactus est*." Says the prætor in Leg. 1, ff, h.: "I will not confirm that which was done through fear."

The intimidation, however, must have been illegal or unjust, "*contra bonos mores*." The definition of the Roman law is an admirable one; "an agitation of the mind caused by fear of damage present or prospective:" Dig. l. 4, tit. 2.

What is very significant in this rule of the old civil law, is this: the establishment of the test that the fear should be of such an evil as to overcome the will, "*hominis constantissimi*," of a man of very great courage. We not infrequently find just such tests in the laws of a warlike and stern race, with whom power of endurance is held as a virtue of great magnitude. Too often such laws throw their mantle around the strong, while they leave those most helpless and needy outside their pale of their protection. The Roman

law rule, though in some respects harsh, suited the genius of the nation.

We have seen how the civil-law rule was incorporated by Bracton into the body of the common law; this was at a period when lawlessness was more paramount than law; when feudalism with its knight-errantry dominated the land. Any principle to take root at such a time necessarily must have been of a harsh and inflexible nature. When the wager of battle had scarce superseded the use of the heated plough-share, as a test of innocence, Bracton's rule was introduced, as to what degree of fear should amount to duress per minas. It was adapted to the taste and manners of the age. Even *his* definition, however, was cut down and abridged, when the only threats courts took cognisance of were fear of death, mayhem or loss of limb. Intimidation caused through fear of other damage was not considered sufficient to overcome the equanimity of the mind. If a man had urged that his will had been overcome by threats of a different kind from those mentioned, he would have been answered that he should have defied the threats, suffered the consequences and then have resorted to the law for *satisfaction*! Does not this statement illustrate the impossibility of enumerating all the cases in which a certain principle should be applied? Definitions in order to be of any great practical value, must be *ductile*, not *rigid*. The modern civil law recognises this idea and has accordingly enumerated certain rules on the subject under consideration deserving of great attention. They are not based upon the assumption of the strength of the human will, but rest wholly upon a due regard to the necessary elements of every contract. While the cardinal doctrine of the Roman law is retained, its application is extended and greatly enlarged and moulded to harmonize with the ideas of a civilized age and the human administration of justice.

Says Grotius: "The assent is imperfect if produced through agitation of mind, the effect of violence:" Grotius de Jur. Bell. l. 2, c. 2, n. 7. Pothier uses the same reasoning: "Il n'y a pas alors de *volonté* même *contrainte*:" Poth. Pand. As to the degree of violence sufficient to produce this "agitation of the mind," the civil law looks to the sex, age and condition of the parties. "We judge of the degree of fear by the *quality* of the person on whom it is exercised and by the *circumstances* which cause it:" Fieffe—La Croix, Tome 1, 99.

No explanation of the doctrine is clearer than that found in Domat, whose reasoning is as cogent as his definition is precise. He says: "It is to be remarked that seeing all persons have not the same courage to resist violence and threatenings, and that many are so weak and fearful that they cannot stand out against the least impression, we ought not to limit the protection of the laws against threatenings so as to restrain only such acts as are capable of overcoming persons of the greatest courage and intrepidity. But it is just, likewise, to protect the weakest and most fearful, and it is chiefly on their account that the laws punish all acts of violence and oppression:" Domat, pt. 1, Bk. 1. Tit. 18, sec. 2, 1245 *et seq.* He defines duress to be "all unlawful impressions which move one against his will, for fear of some great evil, to give a consent which he would not give if his liberty were free from the said impression."

Domat's logic totally demolishes the argument that the duress should be such as to overcome the will of a man of firmness. He not only demonstrates the injustice but the unreasonableness of this rule. In substance he says: "When a man is under an obligation from principles of duty to do or not do a certain thing, it is no more than just that he should be held to a strict accountability, and, therefore, should not be heard to plead duress as an excuse for the non-fulfilment of his duty, unless that duress was overpowering and in a measure irresistible. In such a case the law says to him: 'You should be stout-hearted and firm.' But, on the other hand, when it is a mere question of interest whether a man should adopt a certain course, and threats are resorted to, his *reason* tells him to yield to the threats rather than by resisting them to subject himself to a greater evil. With him it is a mere question of *policy* and *utility*. The idea never entered into the mind of Domat as it did into that of Coke that a man should submit to being maltreated rather than comply with threats, and afterwards seek such *satisfaction* as he could obtain out of a suit at law. There is no need to draw a comparison between the common sense of the civil-law rule and the doctrine of Coke. Nor need we dwell longer upon the theory of the civil law than is necessary to quote another author, who is no less lucid than Domat. Merlin, after explaining the law absolving parties from fulfilling a contract entered into through fear, says: "They were not free to act, since they could *only* exercise their judgments in determining which

of *two courses* they should select. That which impedes the free exercise of the will and determination is contrary to liberty of action :” Merlin, Questions de Droit, Tome 4, 409.

The principle thus stated has been ingrafted into the Code Napoléon, art. 1109.

Having examined the various rules of the Roman, common and modern civil law, we are qualified to come to a conclusion, as to which of these is best adapted to the administration of justice at the present day. England, with her reverence of what is called the “common law,” adheres in a great part to the *old rule*. In this country we need not be surprised to find this somewhat shattered. It received its first blow in the early cases of *Sasportas v. Jennings*, 1 Bay 470, and *Collins v. Westbury*, 2 Bay 211. In these cases it has been held that duress of property was sufficient to avoid a contract. They were followed up by the case of *Forshay v. Fergusson*, 5 Hill 158, where BRONSON, J., citing these authorities, says : “In such a case there is nothing but the form of a contract without the substance. Why should the wrongdoer derive an advantage from his tortious act ?” Before proceeding farther let us say, that many cases are to be found holding that money involuntarily paid may be recovered back. These rest upon a different ground from that we are considering. The distinction is stated in *Atlee v. Backhouse*, 3 Mees. & W. 633, and *Oates v. Hudson*, 6 Exchequer 346.

A few of the American courts adhere to the old rule in all its rigidity. The great majority of them, however, have extended its operation and some have entirely discarded it. The Supreme Court of Pennsylvania, in the case of *Miller v. Miller*, say : “We concur with the counsel for the defendant in error that in civil cases the rule as to duress per minas has a broader application at the present day than it formerly had :” 68 Penna. St. 486.

The leaning of this court toward the liberal doctrine is intimated in *Fulton v. Hood* ; opinion of STRONG, J., 34 Penn. 373.

In New York it has been held that terrifying a woman by threats to prosecute her husband for alleged embezzlement and thus obtaining from her a transfer of her separate property, was a sufficient duress to avoid the conveyance : *Edie v. Sherman*, 26 N. Y. 9.

The Supreme Court of the United States has had under consideration many cases of late years involving the question. The latest is that of *The United States v. Huckabee*, 16 Wall. 431. In

this case it is held that trespass to lands or destruction of goods may constitute duress per minas, and that the reason assigned for the more stringent rule, that a man should rely upon the law for redress is not satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury. The court repeats as a rule that the duress must be such as to overcome the will of a man of "ordinary firmness."

We have already shown how unsatisfactory a test this is and how little consonant with justice. In the case of *Walbridge v. Arnold*, this was apparent. Arnold was a blind man, and had given a note under circumstances which he asserted amounted to duress. The judge charged the jury that in order to constitute a case of duress per minas, it must have been such as to have overcome the mind of a man of *ordinary firmness*. Arnold's counsel insisted that he was not a man of ordinary firmness of mind, and excepted to the charge. The appellate court in delivering its opinion held, that if the part of the charge excepted to had been all the charge, it would have been erroneous, as it was calculated to draw the attention of the jury from Arnold's peculiar *circumstances*: 21 Conn. 231.

In fact the Supreme Court of the United States has applied the same reasoning we have used in an analogous case. In the case of *Railroad Co. v. Gladmon*, it was said that while in a suit by an adult against a railroad company for damages he must show that he used "reasonable care and caution," yet of an infant less discretion is required, and the degree depends upon his age and knowledge. "The caution required is according to the maturity and capacity of the child, and that is determined in each case by the circumstances of that case:" 15 Wall. 408.

The *test* we have spoken of is certainly the most obnoxious feature of the old rule. We have endeavored to trace its history, and to show the influences which established it. We have seen how it has been superseded by the more equitable rule of the modern civil law. The question then occurs whether an enlightened jurisprudence, which disfavors all species of oppression and bad faith, and is ever ready to assist the weak and punish those who take advantage of their weakness, should retain this rigorous and unreasonable doctrine, so antagonistic to an enlarged and liberal spirit of justice. Its practical effect is to put *in delicto* a party who has chosen the less of two misfortunes, by yielding to menaces,

which he was under no *moral* obligation to resist. The agreement which he has entered into under such circumstances, cannot be said to be binding. By tendering back the consideration, if any has been received, the law should place him *in statu quo*. No obligation can be of any force, if the assent of one of the parties to it is wanting; and an assent not voluntarily given is no assent in law.

We accordingly submit that it would harmonize conflicting authority and establish a principle in accordance with the present administration of law, if courts of justice would pay regard to the following propositions:—

1. That *any unlawful threats* amount to duress per minas, sufficient to avoid a contract or agreement, if such contract or agreement would not have been entered into, if the threats had not been used.

2. That the question whether a contract or agreement was entered into through fear, is a question of *fact*, for the jury to decide in each individual case, and that therefore it would be erroneous for a judge to charge *as a principle of law*, that the duress, in order to avoid the obligation, must have been such as was calculated to overcome the will of a man of ordinary firmness of mind.

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## PIRACY BY MEMORIZATION.

IN *Coleman v. Wathen*, 5 Term R. 245 in 1793,—which appears to have been the second case in the reports in which dramatic copyright or “stage-right,” as it has been not improperly called, came before the courts; it having been preceded only by *Macklin v. Richardson*, Amb. 694, in 1770—a new and elaborate question arose, for which they were entirely unprepared.

In *Macklin v. Richardson*, Amb. 694, the plaintiff was author of a farce entitled “*Love à la Mode*,” in two acts, which was performed by his permission several times at different theatres in successive years, but never printed or published by him. When the performance of the farce was over, he had been in the habit of taking the copy away from the prompter; and whenever it was played at benefits or on other particular occasions, plaintiff had been in the habit of charging a certain sum for its performance, to the beneficiaries on those occasions.